FOR ARGUMENT

Supreme Court, U.S.
FILED
MAR 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 85-2068

CONSTABLE WALTER H. RANKIN, ET AL.,
Petitioners

v.

ARDITH McPHERSON,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

MIKE DRISCOLL*
County Attorney
Harris County, Texas

BILLY E. LEE
Assistant County Attorney
1001 Preston
Suite 634
Houston, Texas 77002
(713) 221-5101
Attorneys for Petitioners

*Of Counsel

MARCH 1987

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

INDEX OF AUTHORITIES

CASES	Page
Arnett v. Kennedy, 416 U.S. 134 (1974)	11
Bethel School District No. 403 v. Fraser, No. 84-1667 (July 7, 1986)	7
Brandenburg v. Ohio, 395 U.S. 444 (1969)	8
Branti v. Finkel, 445 U.S. 507 (1980)	2, 13, 14
Central Hudson Gas & Elec. Corp. v. Public Service Comm'n., 447 U.S. 557 (1980)	6
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	7, 9
Cole v. Richardson, 405 U.S. 676 (1972)	11
Connick v. Myers, 461 U.S. 138 (1983)	*passim*
Cornelius v. NAACP Legal Defense and Educational Fund, Inc., No. 84-312 (July 2, 1985)	14
Cramp v. Board of Public Instruction, 368 U.S. 278 (1961)	10
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., No. 83-18 (June 26, 1985)	4, 7, 8, 9
Elfbrandt v. Russell, 384 U.S. 11 (1966)	10
Elrod v. Burns, 427 U.S. 347 (1976)	13, 14
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)	7, 9
Frohwerk v. United States, 249 U.S. 204 (1919)	8
Harisiades v. Shaughnessy, 342 U.S. 580 (1952)	8
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	10
Mine Workers v. Illinois Bar Ass'n., 389 U.S. 217 (1967)	9
New York v. Ferber, 458 U.S. 747 (1982)	6, 7, 8, 9
Olmstead v. United States, 277 U.S. 438 (1928)	12
Parker v. Levy, 417 U.S. 733 (1974)	9
Perry Education Assn v. Perry Local Educators' Assn, 460 U.S. 37 (1983)	14
Pickering v. Board of Education, 391 U.S. 571	6, 10, 15
Posados de Puerto Rico Assoc. v. Tourism Co., No. 84-1903 (July 1, 1986)	15
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	3
Roth v. United States, 354 U.S. 476 (1957)	7
United States v. Robel, 389 U.S. 258 (1967)	10
Watts v. United States, 394 U.S. 705 (1969)	10
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)	9

Page

UNITED STATES CONSTITUTION

First Amendment ..... *passim*

UNITED STATES STATUTES

18 U.S.C. § 871(a) 10

TEXT

A. Bickel, *The Morality of Consent* 62 (1975) 9

LAW REVIEW ARTICLE

Bork, *Neutral Principles And Some First Amendment Problems*, 47 Ind. L.J. 1 (1971) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 85-2068

CONSTABLE WALTER H. RANKIN, ET AL.,
Petitioners

v.

ARDITH McPHERSON,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

As the Solicitor General has joined us in explaining, this Court's decision in *Connick v. Myers,* 461 U.S. 138 (1983), requires reversal of the judgment below. Respondent's remark expressing her genuine desire for the assassination of the President did not touch on a "matter of public concern" within the *Connick* Court's understanding of that term. Moreover, whatever limited First Amendment value exists in respondent's statement is

clearly outweighed by the countervailing interests of the law enforcement agency for which she worked. Respondent's arguments to the contrary are unfounded.[1]

1. Respondent first contends (Resp. Br. 19-25) that her remark was "a protected form of political hyperbole" that represented a mere expression of unhappiness with the President's policies. In seeking to characterize her statement in this way, respondent asks this Court to set aside the district court's contrary findings of fact. There is no reason to do so.

The district court in this case expressly defined "the serious question" for decision on remand to be "what did [respondent] 'mean' " by her statement (Pet. App. 25a). It then found incredible respondent's testimony that "she meant nothing, * * * that those words were mere political hyperbole" (*ibid.*). Rather, the court found that respondent's statement was "something more than political hyperbole," that her words "expressed such dislike of a high public government official as to be violent words, in context" (*ibid.*). On appeal, the Fifth Circuit found that "the record supports the district court's conclusion that [respondent] expressed an actual wish for the assassination of the President" (*id.* at 39a), especially since the district court's conclusion "may have been based in part on the demeanor of the witnesses" (*ibid.*).

This Court has a "settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred" (*Branti v. Finkel,* 445 U.S. 507, 512 n.6 (1980)). The finding of the courts below that respond-

1. This reply brief, while representing the views of petitioners has been prepared in consultation with the Solicitor General.

ent's remark expressed an actual wish for the assassination of the President is precisely such a factual determination See *Pullman-Standard v. Swint*, 456 U.S. 273, 287-288 (1982). No exceptional circumstances justify reconsideration of that finding by this Court now.[2]

2. Amicus National Education Association (NEA) contends (NEA Br. 13-14) that, because "[t]his case does not involve speech over 'internal office affairs' or an 'employee grievance,' *Connick's* discussion of the limitations that apply to First Amendment claims [of public employees] has no application here." Amicus argues, in other words, that a public employee's speech should *always* be deemed to address a "matter of legitimate public concern," as that phrase was used in *Connick*, unless the speech addresses "internal office affairs" or "an employee's grievance," the particular subjects held not to be "matters of public concern" by the Court in *Connick*. This effort to confine *Connick* to its facts is untenable.

Much employee expression unrelated to "internal office affairs" or "employee grievances" does not touch on "matters of public concern," within the *Connick* Court's meaning of that term. Gossip among employees about mutual friends and acquaintances is purely a private matter. Routine use of profanity and obscenity by employees does not constitute speech on a "matter of public concern." And, without exhausting the available examples,

---

2. The Court's statement in *Connick* (461 U.S. at 147-149 & nn. 7, 10) that it will examine the whole record to determine whether an expression touches on a "matter of public concern" is completely consistent with this rule. The statement in *Connick* refers to the legal characterization of a remark, not the subsidiary factual determinations concerning exactly what a speaker said, when she said it, and what she subjectively "meant" by her statement.

sexual invitations from one employee to another clearly do not address any public issue.

Under amicus's interpretation of *Connick*, an employer's decision to dismiss an employee for engaging in any of these kinds of expression would be subject to judicial review. But *Connick* determined that, where employee speech does not address a matter of public concern, "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to [this kind of] behavior" (461 U.S. at 147). The *Connick* Court wished to ensure that "government officials * * * enjoy wide latitude in managing their offices[ ] without intrusive oversight by the judiciary in the name of the First Amendment" (461 U.S. at 146). Since amicus's proposed interpretation would undermine the *Connick* decision's motivating purpose, it must be rejected.[3]

---

3. As the Solicitor General has noted (U.S. Br. 14), that the limitations on public employee free speech claims discussed in *Connick* apply to expression which is not tied to "internal office affairs" or "a personal employment dispute" is evidenced by the Court's subsequent decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, No. 83-18 (June 26, 1985). It is true, as amicus NEA notes (NEA Br. 14-15 n.9), that *Dun & Bradstreet* and *Connick* invoked the "public concern" inquiry for different purposes—in *Dun & Bradstreet*, to determine whether punitive damages could be awarded in the absence of a showing of actual malice; in *Connick*, to determine whether a public employee could be discharged in the absence of a particularized showing concerning the reasons for the decision. But that difference does not, as amicus suggests, make *Dun & Bradstreet* irrelevant to the question whether a public employer may discharge an employee for engaging in expressive activity that is unrelated to "internal office affairs" or "a personal employment dispute" without providing a particularized list of reasons for judicial weighing. To the contrary, it shows that *Dun & Bradstreet* is relevant to that question; it shows that the "content, form, and context" analysis of *Connick* is not limited to speech concerning "internal office affairs" or "personal employment disputes" and that the *Connick* decision is not the aberration in First Amendment law that amicus makes it out to be.

3. Respondent argues (Resp. Br. 25-29) that her statement should be treated as "political speech" because it came at the end of, and was associated with, a conversation in which she expressed "her opposition to the President's policies" (*id.* at 27). Respondent seeks to defend the judgment below, in other words, on the theory that the "matter of public concern" addressed by her remark was "the political, social, and economic policies of a national administration" (*ibid.*). Respondent's effort fails for three reasons.

First, the rationale that respondent offers is one that the court of appeals declined to adopt. That court accepted the district court's finding that respondent's remark expressed a genuine desire for the President's assassination; the court then held that the "matter of public concern" addressed by her remark was "the life and death of the president." Pet. App. 36a. In seeking to redefine the "matter of public concern" as "the Administration's policies," respondent is asking this Court to set aside the district court's finding—a finding accepted by the court below as not clearly erroneous—that her remark was "something more than political hyperbole" (*id.* at 25a). As we have explained earlier (see page 2, *supra*), there is no justification for departing from the lower courts' concurrent findings of fact.

Second, respondent's argument misconceives the legal analysis required by the Court's decision in *Connick*. The Court there expressly determined that the district court "got off on the wrong foot * * * by initially finding that, '[t]aken as a whole, the issues presented in the questionnaire * * * are matters of public importance and concern'" (461 U.S. at 143 (citation omitted)). It admonished that the district court should have examined

the "content, form, and context" of each statement in the questionnaire in order to determine *which* statements touched on "matters of public concern." See *id.* at 147-149. On that view, the Court separately examined *each* statement to determine whether it made an independent contribution to the " 'free and open debate [that] is vital to informed decisionmaking by the electorate' " (*Connick v. Myers,* 461 U.S. at 145, quoting *Pickering v. Board of Education,* 391 U.S. at 571-572). The mere fact that the questions concerning "internal office affairs" appeared in the same questionnaire as the question concerning whether employees felt pressured to work in political campaigns was not a sufficient basis for holding that the former, like the latter, touched on "matters of public concern." See 461 U.S. at 147-149.

Third, respondent's argument would enable public employees artificially to elevate their non-public speech to the highest level of First Amendment protection. As the court below observed, under respondent's interpretation "public employees could wrap the protective mantle of the first amendment around a string of gutter words simply by appending a remark to the effect that those words describe some public figure or policy" (Pet App. 35a-36a). This Court has repeatedly refused to aggregate expressive actions for this very reason. See *New York v. Ferber,* 458 U.S. 747, 761 (1982) ("Even a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography"); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n.,* 447 U.S. 557, 562-563 n.5 (1980) (though "utilities enjoy the full panoply of First Amendment protections for their direct comments on public issues[,] [t]here is no reason for providing similar constitutional protection

when such statements are made only in the context of commercial transactions"); cf. *Bethel School District No. 403 v. Fraser*, No. 84-1667 (July 7, 1986) (fact that sexually explicit metaphors occurred in context of speech given to a student government assembly did not make them protected under the First Amendment).

4. Respondent and amicus NEA argue in the alternative (Br. Resp. 25-29; Br. NEA 15-20) that a statement about the desirability of assassinating the President *inherently* touches on a "matter of public concern." This argument misunderstands the "public concern" standard enunciated by this Court's decisions.

The public concern standard is part of an acknowledgment by this Court that "not all speech is of equal First Amendment importance" (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, slip op. 8). Some expression, such as obscenity and fighting words, contributes little to the interchange of ideas and, because the countervailing governmental interest are significant, may be criminalized. See *New York v. Ferber*, 458 U.S. 747 (1982); *Roth v. United States*, 354 U.S. 476, 483 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Other expression, such as commercial speech and indecent words, similarly is "solely in the individual interest of the speaker and [her] specific audience" (*Dun & Bradstreet*, slip op. 12), but the "evil to be restricted [does not] so overwhelmingly outweigh[ ] the expressive interests, if any, at stake [to obviate the need for] case-by-case adjudication" (*New York v. Ferber*, 458 U.S. at 763-764). Thus, such expression receives some First Amendment protection. See *Connick v. Myers*, 461 U.S. at 148-149; *FCC v. Pacifica Foundation*, 438 U.S. 726, 744-751 (1978) (opinion of Stevens, J.). Finally, other

expression—that which addresses matters of "serious literary, artistic, political, or scientific value" to the community (*New York v. Ferber*, 458 U.S. at 761)—relates to "matters of public concern" and receives the highest degree of protection available under the First Amendment. See *Dun & Bradstreet*, slip op. 8-13; *Connick v. Myers*, 461 U.S. at 145.

Speech expressing approval of the assassination of the President clearly does not address a matter of "public concern." Such expression cannot be said to have "serious literary, artistic, political, or scientific value" to the community. *New York v. Ferber*, 458 U.S. at 763-764. It does not address a subject that may be legally or constitutionally turned into public action by a democratic majority; to the contrary, it advocates rejection of the processes that our Constitution establishes for defining political and social truth. For this reason, the Court has long held that such expression is entitled to *no* protection under the First Amendment when it is likely to incite or produce imminent and lawless action. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Harisiades v. Shaughnessy*, 342 U.S. 580, 591-592 (1952); *Frohwerk v. United States*, 249 U.S. 204, 206 (1919). While expression that merely favors the assassination of the President obviously does not present an imminent threat to the stability of the constitutional order, it is similarly incapable of being turned into legitimate public action.[4]

4. Contrary to the suggestion of amicus NEA (NEA Br. 19), many expressions of pure opinion—such as a statement that "I disagree with the President's policies"—will assist the public in evaluating a public official's performance. Such opinions (like votes) provide information concerning the intensity of the social consensus that exists (or does not exist) on a particular issue or administration. But opinions do not provide such information when the issue they address cannot be turned into legitimate public action—such as

Accordingly, such expression does not address "matters of public concern," as those words have been used in this Court's First Amendment decisions. See Bork, *Neutral Principles And Some First Amendment Problems,* 47 Ind. L.J. 1, 31-35 (1971) (expression favoring the overthrow of the government or violation of law is not political speech, even where the desired action is not imminent, because it favors the damage and destruction of the very processes our Constitution establishes for discovering and spreading political truth); A. Bickel, *The Morality of Consent* 62-79 (1975).

Of course, "[t]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political" (*Mine Workers v. Illinois Bar Ass'n.*, 389 U.S. 217, 223 (1967)). Thus, in contending that respondent's speech does not touch upon "a matter of public concern," we do not suggest that her words are "totally beyond the protection of the First Amendment," or that they fall into "one of the narrow and well-

---

whether to assassinate the President. In these rare cases, the opinion provides no information usable by the voting public.

Likewise, there is no merit in the suggestion of respondent and amicus NEA (Resp. Br. 28-29; NEA Br. 16-17, 19-20) that the analysis proposed here invites the Court to engage in some new and illegitimate form of judicial censorship. As noted in text, this Court has long treated the classification of expression as a legitimate part of the judicial function. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, slip op. 8-11; *FCC v. Pacifica Foundation*, 438 U.S. 726, 742-748 (1978) (opinion of Stevens, J.) (same); *Chaplinsky v. New Hampshire*, 315 U.S. at 572. Exercise of that function routinely requires consideration of the "content" of the speech in issue. See *New York v. Ferber*, 458 U.S. 747, 754 (1982); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66-71 (1976) (opinion of Stevens, J.). And it occasionally, albeit rarely, requires consideration of the speaker's viewpoint. See, *e.g., Parker v. Levy*, 417 U.S. 733 (1974) (upholding statute which prohibited members of the armed forces from making speeches which "bring discredit upon the armed forces").

defined classes of expression which carries so little social value * * * that the State can prohibit and punish such expression by all persons in its jurisdiction" (*Connick v. Myers*, 461 U.S. at 147). As the court of appeals observed (Pet. App. 34a), "[a] state would * * * face considerable constitutional obstacles if it sought to criminalize the words that were uttered by [respondent] on the day the President was shot."[5] But "the State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general' " (*Connick v. Myers*, 461 U.S. at 140, quoting *Pickering v. Board of Education*, 391 U.S. at 568). Under *Connick*, a public employee may be discharged without a judicial weighing of First Amendment and governmental interests when the employee's expressive activity addresses "matters only of personal interest." Respondent's statement that she genuinely hoped that the President would be assassinated is just such private expression.[6]

---

5. Thus, contrary to the suggestion of respondent (Resp. Br. 22-24), *Watts v. United States*, 394 U.S. 705 (1969), does not bear on the argument advanced here. The *Watts* Court decided only that the utterance at issue in that case was not a "threat" within the meaning of 18 U.S.C. 871(a), a statute that criminalizes knowing and willful "threats" on the life of the President. The *Watts* Court had no occasion to decide, and thus did not decide, whether Mr. Watts' remark addressed a "matter of public concern." Nor did the Court decide whether, if Mr. Watts had been employed by a public law enforcement agency, the government could have discharged him for stating that, if drafted, "the first man I want to get in my sights is L.B.J." (394 U.S. at 706).

6. Amicus NEA errs in suggesting (NEA Br. 7-9, 10) that this Court has held that public employees may not be discharged for expressing approval of the use of violent force or violation of major criminal laws. The cases amici NEA cites (see *United States v. Robel*, 389 U.S. 258, 262-266 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 606-610 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 16-19 (1966); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 285-288 (1961)) involved regulatory schemes which, among other

5. Even assuming, however, that respondent's remark touched on a "matter of public concern," it is clear that the governmental interest that the Constable sought to promote by discharging respondent outweighs whatever First Amendment interest she has in expressing her wish for the assassination of the President while on the job. Respondent does not advance any convincing argument to the contrary.

Respondent first misstates the governmental interest that the Constable sought to promote by discharging her. The Constable did not discharge respondent out of mere disenchantment with her views. Resp. Br. 33-34. Nor did he discharge her simply because he lacked confidence that someone with respondent's views could be trusted to use a typewriter. NEA Br. 20-22. Rather, the Constable discharged respondent to ensure that his Office's reputation and appearance of being fully committed to enforcement of the law would not be impaired. Thus, when asked if respondent's continued employment "with her known views of wanting the President assassinated" would "impair the workings of [his] office" (Feb. 14, 1983 Tr. 69), the Constable testified that "all agencies and people would lose complete confidence in our office and upon me. I think our credibility would be destroyed."

---

things, prohibited employees from belonging to organizations in which *other* individuals had at some time advocated the use of violent force or the violation of major criminal laws. The Court held that those regulatory schemes were unconstitutionally vague and overbroad because they might discourage public employees from engaging in protected political association. See *Connick v. Myers*, 461 U.S. at 144-145 ("The issue [in those cases] was whether government employees could be prevented or 'chilled' by the fear of discharge from joining political parties and other associations that certain public officials might find 'subversive.'"). There is and can be no similar vagueness or overbreadth challenge here. See *Arnett v. Kennedy*, 416 U.S. 134, 158-164 (1974); *Cole v. Richardson*, 405 U.S. 676, 677-678, 681-686 (1972).

Ibid. The district court accepted this testimony as the true and correct reason for respondent's discharge. See Pet. App. 7a, 10a, 25a.[7]

Having misstated the governmental interest that motivated the Constable, respondent understandably fails to appreciate why the Constable did not consider the "ministerial" nature of her duties as a dispositive factor in determining whether or not to discharge her. A law enforcement agency may properly insist that its employees refrain from espousing approval of violations of the law in order to promote public respect for, and voluntary compliance with, the laws the agency is charged with enforcing. Cf. *Olmstead v. United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). *Every* employee of the agency is responsible for assisting it in the achievement of this objective.

A law enforcement agency's effectiveness would clearly be undermined if every employee holding a "lowly job" were at liberty to undercut the message that the agency is responsible for sending to the public. Thus, as amicus NEA concedes (NEA Br. 21), a "white supremacist might constitutionally be denied a job as an equal employment counsellor, and one who believes that incarceration is morally wrong might be denied a job as a prison guard." Likewise, as the Solicitor General points out (U.S. Br. 27-28), the Internal Revenue Service should not be required to employ someone who advocates tax fraud, and a draft board should not have to employ someone who insists on flaunting expletives concerning the draft. And, contrary to respondent's suggestion (Resp.

---

7. We are therefore at a loss to understand amicus's claim (NEA Br. 23) that "[t]he Constable did not purport to fire [respondent] because her remark threatened public confidence in the agency."

Br. 38), we think that the FBI should be entitled to discharge any employee who expresses approval of the assassination of civil rights leaders or other public figures. In each of these situations, it should be irrelevant how lowly or elevated the employee's job description may sound; both the public and the agency's other employees will take the laws the agency is charged with enforcing less seriously if they know or have reason to believe that the agency employs persons who favor the violation of those laws.[8]

This governmental objective is not, as respondent and amicus NEA imply (Resp. Br. 39-41; NEA Br. 27-29), the equivalent of requiring all public employees to take a vague oath of "loyalty to the Government." The Constable has not required respondent or any other employee affirmatively to express support for any abstract governmental principle or creed. He has simply required that they refrain from expressing their approval of violent crime while working for his law enforcement agency. Such a prohibition is clearly constitutional.[9]

---

8. The brief of amicus NEA reflects (Br. NEA 24-27) a fundamental lack of appreciation for a law enforcement agency's interest in fostering public respect for and voluntary compliance with the laws. The public can lose respect for those laws whether or not a remark can "reasonably be interpreted to suggest that [an individual] wishe[s] to interfere in any way with the ability of the [agency] * * * to carry out its public mission" (*id.* at 25). It can lose respect for those laws even it understands that an individual, "as a CRT operator, [is] in [no] position to harm the mission of the agency" (*id.* at 25). And it can lose respect for those laws even if the agency announces that it remains committed to that function. See *id.* at 26-27. In each case, by retaining an employee who expresses approval of violations of laws that the agency is charged with enforcing, the agency teaches by its toleration that the laws it is supposed to enforce are not all that important.

9. *Branti v. Finkel*, 445 U.S. 507 (1980), and *Elrod v. Burns*, 427 U.S. 347 (1976), are not to the contrary. *Branti* and *Elrod*

Thus, contrary to the argument of respondent and amicus NEA (Resp. Br. 32-34, 36-37; NEA Br. 24-25), the Constable had a reasonable basis for concluding that respondent's continued employment would impair the reputation and appearance of his Office. As the district court concluded, the Constable "does a great deal of work with the public" (Pet. App. 25a). People "would lose confidence in his officers and in him personally, and his credibility as a law enforcement officer would be destroyed," if he retained an employee who "espouse[d] the assassination of any president, judge, or other public official" (*id.* at 7a). Under this Court's precedents, the Constable did not have "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships [were] manifest before taking action" (*Connick v. Myers*, 461 U.S. at 152). Cf. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, No. 84-312 (July 2, 1985), slip op. 21 ("Government need not wait until havoc is wreaked to restrict access to a nonpublic forum"); *Perry Education Assn v. Perry Local Educators' Assn*, 460 U.S. 37, 52 n.12 (1983) (same). Rather, he was entitled to act on his quite reasonable beliefs.[10]

---

hold only that a public employee's political beliefs or party affiliation must be related to the effective performance of the public office involved if they are to be a basis for her discharge. Here, respondent's expressed desire for the assassination of the President is inconsistent with the effective performance of the public office of which she is a part. Thus, *Branti* and *Elrod* in fact support the position that we have taken here.

10. Amicus NEA's suggestion (NEA Br. 27) that, prior to discharging an employee for engaging in such expressive activity, a public agency must take a Gallup-type poll concerning the speech's effect on public perceptions is preposterous. An agency would not promote its reputation and appearance by publicizing the imprudent actions and behavior of its employees. To the contrary, by doing so, the agency would simply intensify the very adverse effects it is

Against the Constable's interest in maintaining his office's reputation and appearance must, of course, be balanced respondent's First Amendment interest in speaking the words she spoke. See *Connick v. Myers,* 461 U.S. at 142; *Pickering v. Board of Eduction,* 391 U.S. at 568. But, having failed to acknowledge that the Constable was motivated by a legitimate concern for his office's reputation and appearance, respondent makes no attempt to weigh the competing interests in this case. We rest, therefore, on the discussion in the Solicitor General's brief (U.S. Br. 24-26), which shows that respondent's trivial First Amendment interest in expressing her desire for the assassination of the President while on the job is easily outweighed by the Constable's interest in maintaining the reputation and appearance of his office.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

MIKE DRISCOLL
County Attorney

BILLY E. LEE
Assistant County Attorney

Attorneys for Petitioners

MARCH 1987

---

attempting to avoid by discharging the employee. And, in any event, this Court has indicated that the determination concerning how to minimize the adverse effects of undesirable behavior should be left to the responsible agency's judgment; it is not a matter for courts to decide. See *Posados de Puerto Rico Assoc. v. Tourism Co.*, No. 84-1903 (July 1, 1986), slip op. 14-15.

CERTIFICATE OF SERVICE

This is to certify that on this 10 day of March, 1987, I caused a signed true copy of the Reply Brief for the Petitioners to be placed in the United States Postal Service, with proper postage prepaid, addressed to counsel of record for respondent herein:

Bruce V. Griffiths, Esq.
1236 West Gray
Houston, Texas 77019

Alvin J. Bronstein, Esq.
David B. Goldstein
132 West 43rd Street
New York, New York 10036

Annie S. Garcy, Esq.
4848 Loop Central, Suite 800
Houston, Texas 77081

Lloyd N. Cutler
William R. Richardson, Jr.
Carl R. Johnston
Teresa D. Baer
2445 M Street, N.W.
Washington, D. C. 20037-1420

Billy E. Lee

BILLY E. LEE
Assistant County Attorney